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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 435

JOHN F. MULCAHEY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, DETROIT DISTRICT, PETITIONER,

vs.

GUISEPPE CATALANOTTE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 13, 1956

CERTIORARI GRANTED NOVEMBER 19, 1956

SUPREME COURT OF THE UNITED STATES

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1 [File endorsement omitted]

Appendix to Appellee's Brief—Filed March 15, 1956

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

PETITION FOR WRIT OF HABEAS CORPUS—Filed November 10, 1954

To the Honorable, the Judges of the United States District Court, for the Eastern District of Michigan:

Your petitioner, Guiseppe Catalanotte, alleges that he is unlawfully imprisoned and detained by James W. Butterfield, District Director of Immigration and Naturalization, in the Wayne County Jail, and such other places of detention as are provided for immigration prisoners in the City of Detroit, County of Wayne, State of Michigan, and under bail and by virtue of a pretended writ or warrant issued by the District Director of Immigration and Naturalization at Detroit, Michigan. His imprisonment and detention are unlawful in that:

1. Petitioner entered the United States for permanent residence September 11, 1920, and has continued to reside in the United States since that time without any absence therefrom.

2. Petitioner is married to a citizen of the United States and has two children who are citizens of the United States by virtue of birth in the United States.

3. Petitioner has fully complied with all the requirements upon him and has exhausted his remedy by appealing to the Board of Immigration Appeals and the Attorney General of the United States.

4. Petitioner has not been accorded a full and fair hearing as required by law.

5. The order for deportation of petitioner constitutes an abuse of discretion.

6. The order for deportation is based upon misapplication of law.

2 7. The decision adopts an erroneous conclusion of law.

Wherefore, your petitioner prays that a writ of Habeas Corpus issue out of this court to James W. Butterfield, District Director of Immigration and Naturalization, Detroit, Michigan, commanding him forthwith to have the body of this petitioner before the Court, together with the cause of his detention and to abide the further order of the Court herein.

Guiseppe Catalanotte, Petitioner.

Dated: November 1st, 1954.

Duly sworn to by Guiseppe Catalanotte. Jurat omitted in printing.

Let a writ issue as prayed for in the foregoing petition.
Arthur F. Lederle, United States District Judge.

November 1, 1954.

 In United States District Court

Exhibit "A"

3770 East Jefferson Ave.
Detroit 7, Mich.

E-051721 DEP

November 2, 1954

Mr. Joseph S. Hertogs
580 Washington Street
San Francisco, California

Dear Sir:

Re: Guiseppe Catalanotte

In accordance with the conditions of bond executed by you on January 6, 1954, in behalf of the above-named subject, you are hereby directed to deliver him in complete readiness for deportation to Italy at the Office of the District Director, Immigration and Naturalization Service, 3770 East Jefferson Avenue, Detroit, Michigan, no later

than 10:00 A. M., Friday, November 12, 1954. Transportation arrangements have been completed for Mr. Catalanotte to leave New York on November 16, 1954 aboard the SS "Conte Biancamano" sailing for Italy. Failure to deliver Mr. Catalanotte as directed will be followed by recommendation on the part of this office for forfeiture of bond.

Please cooperate with this Service and please be advised that when you deliver the subject to this office on November 12, 1954, he must be in possession of all his personal belongings and money due him from any source whatsoever.

4 Kindly acknowledge receipt of this letter on the copy hereto attached.

Very truly yours, Mr. James W. Butterfield, District Director, by: (S.) John T. Clingan, Acting Chief, Investigations, Detention and Deportation Section.

cc: Mr. Giuseppe Catalanotte,
c/o Mrs. Angela Baker,
20291 Lockmoor Dr.,
Harper Woods, Michigan.

Encl.

Registered Airmail

Return Receipt Requested

cc: Mr. Louis M. Hopping,
Attorney at Law,
2256 Penobscot Building,
Detroit 26, Michigan.

IN UNITED STATES DISTRICT COURT

ANSWER AND RETURN TO PETITION FOR WRIT OF HABEAS CORPUS—Filed November 22, 1954

Now comes the respondent, James W. Butterfield, District Director, United States Immigration and Naturalization Service, Detroit, Michigan, by Fred W. Kaess, United States Attorney, and Dwight K. Hamborsky, Assistant

United States Attorney, and respectfully shows this Honorable Court that he,

1. Denies the allegation contained in the first paragraph of the petition that the petitioner is unlawfully imprisoned and detained. Respondent avers that the petitioner is lawfully held in the custody of the respondent in pursuance of a warrant of deportation issued by the respondent on November 2, 1954, at Detroit, Michigan, a copy of said warrant of deportation being attached hereto and made a part hereof.

2. Admits the allegation contained in paragraph 1 of the petition that the petitioner entered the United States for permanent residence on September 11, 1920, but the respondent is without knowledge or information sufficient to form a belief as to the truth of the averment that the petitioner has continued to reside in the United States since September 11, 1920, without any absence therefrom.

3. Neither admits nor denies the allegations contained in paragraph 2 of the petition but leaves the petitioner to his proofs.

4. Admits the allegations contained in paragraph 3 of the petition.

5. Denies each and every allegation contained in paragraph 4 of the petition.

6. Denies each and every allegation contained in paragraph 5 of the petition.

7. Denies each and every allegation contained in paragraph 6 of the petition.

8. Denies each and every allegation contained in paragraph 7 of the petition.

Wherefore, the respondent prays that the petition for writ of habeas corpus be denied and that a writ of habeas corpus not be issued.

Fred W. Kaess, United States Attorney, Dwight K. Hamborsky, Assistant U. S. Attorney, Attorneys for Respondent.

Dated: November 18, 1954.

ORDER DENYING WRIT OF HABEAS CORPUS—July 19, 1955

At a session of said Court held in the Federal Building, Detroit, Michigan, on July 19, A. D., 1955.

Present: Honorable Arthur F. Lederle, Chief Judge.

Petitioner herein having filed a petition for a writ of habeas corpus to issue against the Department of Immigration and Naturalization Service, and hearing having been held thereon on the dates of June 27, 1955 and July 18, 1955; and counsel for petitioner and respondent having filed briefs in connection therewith; and the Court having heard said arguments of counsel and having examined the file and the briefs filed in connection therewith, and,

It appearing from the study of all proceedings that the petitioner is not protected by any immunity on his 1925 conviction and that the Immigration and Naturalization Service is within its proper jurisdiction to order the deportation of this alien under the Immigration and Naturalization Laws of this country as promulgated by the Congress of the United States,

It is, therefore, ordered that petitioner Guiseppe Catalonotte's petition for a writ of habeas corpus, to issue against the Immigration and Naturalization Service, be and it hereby is denied and dismissed, for the reason that after a full and complete hearing petitioner has been unable to substantiate the allegations presented in his original petition.

Arthur F. Lederle, Chief Judge.

Clerk's Certificate to foregoing paper omitted in printing.

Appendix to Appellant's Brief

BEFORE THE BOARD OF IMMIGRATION APPEALS
United States Department of Justice
Immigration and Naturalization Service
Kansas City, Missouri

HEARING:

GIUSEPPE CATALANOTTE, Respondent

File: E 0 51 721

Date: June 9, 1953.

Place: United States Penitentiary, Leavenworth, Kansas.

Special Inquiry Officer: P. S. Willmore.

Examining Officer: Lloyd Rosander.

Stenographer: Catherine Dornblaser.

Special Inquiry Officer: This is a deportation hearing in the case of Giuseppe Catalanotte, under executed warrant of arrest and pursuant to a notice served upon him.

Special Inquiry Officer to Respondent:

Q. Do you speak and understand the English language?

A. I understand a little bit.

Q. In what language do you desire that this hearing be conducted?

A. I don't want no hearing now.

Q. Will you please state your name for this record.

A. I can't talk English good; I can't understand English good.

Q. What is your correct name?

A. My name,—you got it there.

Q. What is it?

A. Giuseppe Catalanotte.

Q. You are advised that at this hearing you have the right to be represented by counsel who may be an attorney at law or any other person authorized to practice in immigration and naturalization proceedings. Such represention must, however, be at your own expense. Do you wish to be so represented by counsel?

A. Yes.

Q. Have you made any provision for securing the services of an attorney at this time?

A. Why don't you write to my attorney?

Q. You are advised that this hearing will be continued

until 9:30 A. M., Friday, July 10, 1953. You are requested at that time to have an attorney present to represent you, should you desire. You are also advised that there will be no further continuance for this purpose. If you wish to be represented by an attorney, he must be present at that time. Do you understand?

A. Yes, sir.

9

"Q. Have you ever been charged with the violation of the Federal Narcotic Laws?

A. Yes.

Q. I show you a copy of an Indictment, Judgment and Commitment in Case No. 32918, United States of America vs. Guisseppe Catalonotte, and ask you whether this is a record of your conviction for violation of the narcotic laws?

A. Yes.

Q. Are you now serving sentence under that conviction?

A. Yes."

"Examining Officer to Special Inquiry Officer: I offer in evidence the Indictment, Judgment and Commitment in Case No. 32918, which has been exhibited to the respondent."

Counsel: I will object that it is immaterial in view of the recommendation accompanying this sentence that this conviction be not used as a ground for deportation against the respondent."

"Special Inquiry Officer: The above described Indictment, Judgment and Commitment will be entered into the record as *Exhibit No. 12*. Counsel's objection to the introduction of the document is therefore overruled."

"Q. In connection with your conviction for violation of the narcotic laws, was there a recommendation made by the Court that you not be deported as a result of such a conviction?

A. Yes.

Q. I show you a certified copy of a Criminal

10 Docket, Docket No. 32918, United States vs. Guisseppe Catalonotte, which bears a notation on the docket dated November 25, 1952, reading, "Sentence imposed is not to be used as a basis for deportation". Was it your understanding that such a recommendation was

made and entered into the criminal docket in connection with your conviction?

A. Yes, I understand that that sentence should not be used for deportation purposes."

"Examining Officer to Special Inquiry Officer: At this time I offer in evidence the certified copy of Criminal Docket in the case of the United States vs. Guisseppe Catalanotte, which has been identified by the respondent as relating to him."

"Special Inquiry Officer: The above described document will be entered into the record as *Exhibit No. 13*."

"Examining Officer to Respondent: As a result of your conviction for violation of the narcotic laws, at this time I will urge against you an additionall charge as to why you are subject to deportation from the United States. You appear to be subject to deportation under—

> Section 241(a)(11) of the Inimigration and Nationality Act in that you have been convicted of a violation of any law or regulation governing or controlling, the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation, or the possession for the purpose of manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of any of the drugs described therein, to wit: Unlawful Purchase and Possession of Heroin (Violation of Sec. 2553(a), Title 26, U.S.C.A., and Sec. 174, Title 21, United States Code).

"Special Inquiry Officer to Respondent:

Q. The charge has just been lodged against you that under Section 241(a)(11) of the immigration and Nationality Act, you are subject to deportation for the reason that you have been convicted of a law relating to governing and controlling of narcotics, to wit: Title 26, U. S. C. A., Sec. 2553(a) and Title 21, United States Code, Sec. 174. Do you clearly understand the charge which has just been lodged against you?

A. I understand the charge.

"Special Inquiry Officer to Counsel: Do you desire any

further time for the purpose of preparing a defense against this additional charge?

"Counsel: No, we will not ask for additional time on account of that. I will introduce into the record a certified copy of the transcript of proceedings in the court showing that a recommendation was made by the judge at the time or within thirty days of the sentence referred to, that the respondent be not deported."

"Special Inquiry Officer: The above described certified copy of transcript of the court record described above will be entered into this record as *Exhibit No. 14.*

* * * * * * *

12 BEFORE THE BOARD OF IMMIGRATION APPEALS
United States Department of Justice
Immigration and Naturalization Service

DECISION OF THE SPECIAL INQUIRY OFFICER—August 20, 1954

File No.: E-051721—(Detroit).

In re: Guiseppe Catalanotte.

In Deportation Proceedings.

In Behalf of Respondent: Attorney Louis M. Hopping, 2256 Penobscot Building, Detroit 26, Michigan.

Charges:

Warrant: I. & N. Act—convicted of two crimes after entry, to wit: Receiving Stolen Property, and Malicious Threats to Extort.

Lodged: I. & N. Act—convicted of a violation of a law governing narcotics, to wit: Unlawful purchase and possession of heroin.

I. & N. Act—convicted of a violation of a law governing narcotics, to wit: Illegal traffic of narcotics.

Application: Suspension of deportation or voluntary departure.

Detention Status: Released on $2,000.00 bond.

Warrant of Arrest Served: May 5, 1953.

Discussion: The record relates to a 54 year old, married male, who is a native and citizen of Italy. His only entry into the United States was on September the 10th, 1920 at the port of New York, New York. He was admitted for permanent residence at that time as a "reservist." His

passage was paid by the Italian Government and Head Tax was waived. As the respondent had never resided in the United States prior to September 10, 1920, it is not believed that he was entitled to enter under Public
13 Resolution 44 of October 19, 1918, under which he was evidently admitted. He made application for certificate of lawful entry through registry proceedings, which application was denied on January 5, 1952 on the ground that he failed to establish good moral character.

The respondent was convicted in Recorder's Court, Detroit, Michigan on February 15, 1924 for the crime of Receiving Stolen Property, committed on January 26, 1923. As a result of the conviction he was sentenced to pay a fine of $500.00 or serve five months imprisonment. On May 27, 1954 an order was entered in the Recorder's Court, Detroit, Michigan whereby his conviction and sentence for this crime was set aside, and a plea of not guilty entered in the respondent's behalf. On May 28, 1954 a Judge of the Recorder's Court entered an order dismissing the case.

He was again convicted in the Recorder's Court, Detroit, Michigan on July 30, 1934 for the crime of "Malicious Threats to Extort" committed during May 1934. He was sentenced on October 22, 1934 to serve five to twenty years in the Detroit House of Correction as a result of this conviction.

As the respondent's conviction on the charge of Receiving Stolen Property was set aside by the Court order entered May 27, 1954, the charge contained in the warrant of arrest will not be sustained.

The respondent was convicted in the United States District Court for the Eastern District of Michigan on October 30, 1952 for the offense of Unlawful Purchase and Possession of Heroin. He was sentenced on October 30, 1952 to imprisonment for five years on Count One and nine years, eight months on Count Two of the indictment. The
14 judgment of the District Court was reversed, and the conviction set aside by the United States Court of Appeals, and the Board of Immigration Appeals, in an order dated May 18, 1954 found that the lodged charge based on his conviction on October 30, 1952 was not sustained.

On June 8, 1954 the Board of Immigration Appeals entered an order directing that the hearing be reopened

for the purpose of showing that the respondent's conviction for the crime of Receiving Stolen Property was set aside and for further appropriate action.

At the reopened proceeding an additional charge was lodged against the respondent based on his conviction in the United States District Court for the Eastern District of Michigan on April 13, 1925, when he entered a plea of guilty to violation of the Anti-Narcotic Law. The indictment sets forth that the respondent was charged with having, on November 29, 1924, unlawfully, feloniously and knowingly sell, dispense and distribute certain narcotic drugs, to wit: cocaine hydrochloride, and that he did have in his possession and under his control, and unlawfully, wilfully and knowingly purchased narcotic drugs, not in the original stamped packages, and not having on them the appropriate cancelled United States Internal Revenue Stamps. The respondent entered a plea of guilty to the charge contained in the indictment, and was sentenced to pay a fine of $1,000.00 and to be imprisoned in the Detroit House of Correction for sixty days. He was convicted for violation of Section One and Section Eight, Chapter One of the Act of December 17, 1914, as amended (38 Stat. 789, as amended). On the basis of all the evidence presented, it is concluded that the respondent is deportable only on the charge based on his narcotic conviction on April 13, 1926.

Application was made for the privilege of suspension of deportation, or in the alternative for voluntary departure. The respondent married a naturalized citizen of the United States on June 9, 1926. He has two children, 26 and 24 years of age, who were born in the United States. One of his children is crippled by poliomyelitis, and is dependent upon the respondent. In addition to the convictions previously discussed, the respondent was arrested on October 12, 1942 for Conspiracy to Violate the State Gambling Laws. He was convicted on the charge and sentenced to serve three to five years in Jackson Prison. He stated that he did not enter Jackson Prison until 1945, and he was paroled on October 18, 1948. Under Section 101(f)(7), the respondent cannot be found to be a person of good moral character, because of his confinement for a period of over 180 days. It will, therefore, be found that he is statutorily

ineligible for either suspension of deportation or voluntary departure.

In the event that he is deported from the United States he desires to be returned to Italy.

Findings of Fact:

(1) That the respondent is an alien, a native and citizen of Italy;

(2) That the respondent's only entry into the United States was on September 10, 1920 at the port of New York, New York;

(3) That the respondent was convicted in the Recorder's Court Detroit, Michigan on February 15, 1924 for the crime of Receiving Stolen Property;

(4) That the respondent's conviction for the crime of Receiving Stolen Property was set aside on May 27, 1954 by an order entered in the Recorder's Court, Detroit, Michigan, and on May 28, 1954 the case was dismissed;

16 (5) That the respondent was convicted in the Recorder's Court, Detroit, Michigan on July 30, 1934 for the crime of Malicious Threats to Extort;

(6) That the respondent was convicted in the United States District Court for the Eastern District of Michigan on October 30, 1952 for the offense of Unlawful Purchase and Possession of Heroin, which conviction was subsequently reversed by the Court of Appeals;

(7) That the respondent was convicted in the United States District Court for the Eastern District of Michigan on April 13, 1925 for Illegal Traffic of Narcotics, in violation of Section One and Section Eight, Chapter One of the Act of December 17, 1914, as amended (38 Stat. 789, as amended).

Conclusions of Law:

(1) That under Section 241(a)(4) of the Immigration and Nationality Act the respondent is not subject to deportation in that, he, at any time after entry, has been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct, to wit: Receiving Stolen Property and Malicious Threats to Extort;

(2) That under Section 241(a)(11) of the Immigra-

tion and Nationality Act the respondent is NOT subject to deportation in that, he has been convicted of a violation of any law or regulation governing or controlling, the taxing, manufacture, production compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation, or the possession for the purpose of manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of any of the drugs described therein, to wit: Unlawful Purchase and Possession of Heroin (Violation of Sec. 2553(a), Title 26; U.S.C.A., and Sec. 174, Title 21, United States Code):

(3) That under Section 241(a)(11) of the Immigration and Nationality Act the respondent is subject to deportation in that, he has been convicted of a violation of any law or regulation governing or controlling, the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation, or the possession for the purpose of manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of any of the drugs described therein; to wit: Illegal Traffic of Narcotics, in violation of Section One and Section Eight, Chapter One of the Act of December 17, 1914, as amended (38 Stat. 786, as amended).

Order: It is ordered that the alien be deported from the United States in the manner provided by law on the following charge:

Section 241(a)(11) of the Immigration and Nationality Act, in that, he has been convicted of a violation of any law or regulation governing or controlling, the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation, or the possession for the purpose of manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of any of the drugs described therein; to wit: Illegal Traffic of Narcotics, in violation of Section One and Section Eight, Chapter One of

the Act of December 17, 1914, as amended (38 Stat. 786, as amended).

(S.) A. W. Lombardini, Special Inquiry Officer.

AWL/cmw.

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18 BEFORE THE BOARD OF IMMIGRATION APPEALS

U. S. Department of Justice, Board of Immigration Appeals

In Behalf of Service: Hyman Scher, Service Representative (Heard: September 24, 1954).

Charges:

Warrant: Act of 1952—Convicted of two crimes after entry—Receiving stolen property and malicious threats to extort.

Lodged: Act of 1952—Convicted of narcotic violation on April 9, 1952.

Lodged: Act of 1952—Convicted of narcotic violation on April 13, 1925.

DECISION OF BOARD OF IMMIGRATION APPEALS—October 28, 1954

Application: Termination of proceedings or suspension of deportation or voluntary departure.

Detention Status: Released on bond.

This case is before us on appeal from the decision of a special inquiry officer on August 20, 1954, directing that the respondent be deported.

The respondent is a 54-year-old male, native and citizen of Italy, whose only entry occurred on September
19 10, 1920. The charge stated in the warrant of arrest was predicated on two convictions, one of these being a conviction on February 15, 1924 for receiving stolen property. On May 27, 1954 the respondent's motion to withdraw his plea of guilty was granted, his conviction and sentence were set aside and on the following day the case was dismissed. Under these circumstances, the warrant charge is not sustained. The first lodged charge is not sustained because the respondent's conviction on a narcotic

charge in 1952 was reversed by the United States Court of Appeals for the Sixth Circuit on December 1, 1953.

The question of whether the respondent is deportable now depends solely on a charge which was lodged at the reopened hearing on July 19, 1954. This charge is based on the respondent's conviction in 1925 for a violation of sections 1 and 8 of the Act of December 17, 1914 as amended, at which time he was sentenced to imprisonment for a term of 60 days and was fined $1,000.

The indictment, in that case, charged the respondent and one other person with a sale of a quantity of cocaine hydrochloride and with the possession and purchase of 385 grains of cocaine hydrochloride.

We have carefully considered the contentions of counsel at the oral argument. *Ex parte Robles—Rubio*, 119 F. Supp. 610 (N.D. Cal. 1954)), cited by counsel, is not analogous. That alien was convicted of a narcotic violation on August 27, 1952; on September 23, 1952 the Court recommended that he be not deported; and in deportation proceedings instituted after the effective date of the Immigration and Nationality Act, the Court held that the savings clause of section 405(a) of that Act continued to relieve him from deportation. There were two narcotic convictions in the respondent's case—one on April 13, 1925 and the other on April 9, 1952. On October 30, 1952 sentence was imposed in connection with the latter conviction and on November 25, 1952 the Court stated (Ex. 14) that the conviction was not to be used for the purpose of deportation. The 1952 conviction was reversed by the Court of Appeals and the deportation proceeding is now predicated only on the 1925 conviction. Since there was no recommendation against deportation in connection with the 1925 conviction, it follows that deportation on the basis of that conviction is not precluded by the action of the Court in the 1952 case.

Counsel urges that the 1925 conviction was also before the Court in 1952 because an information was filed by the United States Attorney on June 19, 1952 (Ex. 18) charging the respondent as a second offender and setting forth the two narcotic convictions mentioned above. We do not agree that, because of these circumstances, the Court was in a position to recommend against deportation in the 1925 case.

particularly since the applicable statutory provision[1] specifically authorized that action only at the time of imposing sentence or within 30 days thereafter.

Counsel argues that the respondent applied to the Governor of Michigan for a pardon and was subsequently informed by the Governor's Legal Advisor on July 18, 1950, (Ex. 22) that the Immigration and Naturalization
21 Service had stated that he was not deportable. However, Exhibit 22 does not indicate that such a statement was made by the Service. On the contrary, that letter makes no mention whatever of the Service, or of any information received from the Service and clearly shows that it was the Parole Board who reported to the Governor that the respondent was not then subject to deportation.

It is also contended by counsel that, until at least the Alien Registration Act of 1940, the respondent's conviction in 1925 did not subject him to deportation; that it would constitute increasing the penalty after the commission of the offense if we were now to hold that the respondent is deportable; and that this would be a violation of due process. In this connection, he cites *U. S. ex rel. Cassetta* v. *Watkins*, 73 F. Supp. 399 (S. D. N. Y. 1947). We fail to perceive how this case is of assistance to counsel since the decision was against the alien and his contentions were rejected. The statement by the court, in that case, that section 21 of the Alien Registration Act of 1940 was not retrospective was based on the specific statutory provision to that effect in section 22 of the same Act. There is, however, no similar provision in the Immigration and Nationality Act.

The respondent actually did not become deportable, because of the 1925 conviction, until the effective date of the Immigration and Nationality Act (December 24, 1952). The argument that the penalty or punishment is being increased after the offense was committed is, in reality, a contention that section 241(a)(11) is repugnant to the Constitutional prohibition against ex post facto laws.
22. It is well settled that the ex post facto provision of the Constitution applies only to criminal laws and

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[1] Section 19 of the Immigration Act of 1917 (39 Stat. 889-890; former 8 U. S. C. 155).

not to deportation proceedings,[2] and counsel, conceding this, seeks to utilize the due process clause. While the statute has a retroactive effect in the respondent's case, it is well settled judicially that an alien remains subject to the plenary power of Congress to expel him under the nation's sovereign right to determine what noncitizens shall be permitted to remain in this country.[3] In *Harisiades* v. *Shaughnessy*, supra (footnote 2), the Court concluded that a legally resident alien could be deported because of membership in the Communist Party which terminated before the 1940 amendment[4] on which the deportation proceedings were predicated, and it specifically rejected the argument that this violated the due process clause of the Constitution.

In *Matter of I.*, Int. Dec. 469 (decided July 21, 1953), *Matter of M.*, Int. Dec. 442 (decided June 1, 1953) and *Matter of P.*, Int. Dec. 566 (decided January 28, 1954), all of which involved deportation proceedings based on narcotic convictions, we held that the aliens were deportable under the Immigration and Nationality Act although they had not been deportable prior to the effective date of that Act. The courts have also upheld certain retroactive provisions of the Immigration and Nationality Act,[5]

23 Counsel also contends that the respondent was unable to ask the Court to recommend against deportation at the time of his conviction in 1925 because he was

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[2] *Mahler* v. *Eby*, 264 U.S. 32, 39; *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 595 (1952).

[3] *Carlson* v. *Landon*, 342 U.S. 524 (1952); *Harisiades* v. *Shaughnessy*, supra (footnote 2) at page 587; *Marcello* v. *Ahrens*, 212 F. 2d 830, 836 (C.A. 5, 1954).

[4] Act of October 16, 1918 (40 Stat. 1012; 41 Stat. 1008-9) as amended by section 23 of the Alien Registration Act of 1940 (54 Stat. 673).

[5] *U.S. ex rel. Marcello* v. *Ahrens*, 113 F. Supp. 22, 26, aff'd sub nom. *Marcello* v. *Ahrens*, supra (footnote 3) where the deportation proceeding was based on a marihuana conviction in 1938 which would not have constituted a ground for deportation prior to December 24, 1952 because of the specific provisions of section 22 of the Alien Registration Act of 1940; *U.S. ex rel. Barile* v. *Murff*, 116 F. Supp. 163 (D.C. Md. 1953).

not then deportable. A similar contention was advanced and rejected by the Court in *U.S. ex rel, Circella* v. *Neelly*, 115 F. Supp. 615, 626 (N.D. Ill. 1953) in which the alien was held to be deportable under the Immigration Act of 1917 because of a conviction for a crime prior to entry but could not have applied for recommendation against deportation because the conviction took place on September 24, 1916.

For the reasons stated above, we hold that the respondent is deportable on the second lodged charge under section 241(a)(11) of the Immigration and Nationality Act, based upon the narcotic conviction of April 13, 1925. With respect to the application for suspension of deportation (Ex. 20) which was submitted on August 18, 1954, the respondent is required to prove good moral character during the preceding 10 years under the applicable statutory provision, (section 244(a)(5) of the Immigration and Nationality Act) and our decision in *Matter of M.*, Int. Dec. 442, supra. Section 101(f)(7) of that Act precludes a finding of good moral character in the respondent's case since he was confined in a penal institution from approximately November 1945 to October 1948.

24-25 Although application was also made for voluntary departure, there is some doubt whether the respondent would accept that relief since he would be excludable under section 212(a)(23) of the Immigration and Nationality Act if he attempted to return to the United States. Under section 244(e) of the same Act, voluntary departure cannot be granted to an alien within the provisions of section 241(a)(11) unless he is within the provisions of paragraph (4) or (5) of section 244(a). Paragraph (5) is the applicable paragraph and requires that good moral character be proved for a period of 10 years, whereas section 244(e) requires such proof for five years. As we have indicated above, the respondent cannot prove good moral character for 10 years. We deem it unnecessary to determine definitely whether the respondent would be required to establish good moral character for five years or for 10 years in order to be eligible for voluntary departure since we would deny voluntary departure in this case, in any event, as a matter of administrative discretion. In view of the foregoing, we will direct that the appeal be dismissed.

Order: It is ordered that the appeal be and the same is hereby dismissed.

_____, Acting Chairman.

26 In United States Court of Appeals for the Sixth Circuit

Minute Entry of Argument and Submission—June 6, 1956
(omitted in printing)

In United States Court of Appeals

Order of Substitution—Filed June 15, 1956

Upon motion of the appellant, and for good cause shown,
It is ordered that John F. Mulcahey, Acting District Director, United States Immigration and Naturalization Service, Detroit District, be substituted as the appellee in this appeal in place of James W. Butterfield.

27-28 In United States Court of Appeals

Judgment—Entered August 27, 1956

Appeal from the District Court of the United States for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case is remanded with directions to discharge Catalanotte from custody under the order and warrant for deportation.

29 [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 12729

In the Matter of the Petition of Guiseppe Catalanotte for a Writ of Habeas Corpus, GUISEPPE CATALANOTTE, *Petitioner-Appellant*,

v.

JAMES W. BUTTERFIELD, Dist. Director of Immigration and Naturalization Service, Detroit District, *Respondent-Appellee*.

Appeal from the District Court of the United States for the Eastern District of Michigan, Southern Division.

OPINION—Decided August 27, 1956

Before ALLEN, McALLISTER, and MILLER, Circuit Judges.

McALLISTER, Circuit Judge. In 1925, appellant was convicted on a charge of violating the narcotics law. He was sentenced to imprisonment for a term of sixty days and ordered to pay a fine of $1,000. He served the sentence and paid the fine.

After his conviction, and after he had served the above sentence, he married a young Italian woman who has since become a naturalized citizen. He has two daughters. The older daughter, now twenty-seven years old, has been an invalid since she suffered infantile paralysis at the age of fourteen months. Appellant is the sole support of his wife and children.

Thirty years subsequent to his conviction, in August, 1954, appellant was ordered deported by the Board of Immigration Appeals for the offense which he committed in 1925. From the order of deportation, appellant sought review by way of a petition for a writ of habeas corpus; and from an order of the district court denying his petition, he appeals.

The deportation proceedings are based upon the Immigration and Nationality Act of 1952. Section 241(a)(11)[1] of that statute provides:

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[1] 66 Stat. 204, Title 8, U.S.C.A., Section 1251(a)(11).

"Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who is, or hereafter *at any time after entry* has been, a narcotic drug addict, or who *at any time has been convicted* of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves of isonipecaine or any addiction-forming or addiction-sustaining opiate;" (Emphasis supplied.)

The government contends that, upon proof that appellant was convicted of a violation of a law relating to the illicit traffic in narcotic drugs in 1925, he is, under the above section of the statute, deportable, and that the district court properly denied his petition for a writ of habeas corpus, which was the method adopted to review the decision of the Board of Immigration Appeals.

Appellant's defense to the proceedings for deportation is founded upon the so-called "savings clause" of the Immigration and Nationality Act of 1952. Section 405(a)[2] of the statute provides:

"Nothing contained in this Act, unless *otherwise specifically provided therein*, shall be construed to affect the validity of any declaration of intention, . . . warrant of arrest, order or warrant of deportation, . . . which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions,

[2] See Title 8, U.S.C.A., Section 1101 (page 196).

suits, actions, proceedings, statutes,[3] conditions, rights, acts, things, liabilities, obligations, or matters, the statutes or parts of statutes repealed by this Act are, *unless otherwise specifically provided therein*, hereby continued in force and effect. . . ." (Emphasis supplied.)

Appellant claims that prior to the enactment of the Immigration and Nationality Act of 1952, he had a nondeportable status and that, by virtue of the above mentioned savings clause, such nondeportable status was not affected by any other provision of such Act, inasmuch as it was not specifically provided therein that the statute should be construed to affect such status. The record discloses that appellant, prior to the Act of 1952, had the status of a nondeportable alien. The Board of Immigration Appeals, in its decision in the instant case, properly found from the evidence that: "The respondent actually did not become deportable, because of the 1925 conviction, until the effective date of the Immigration and Nationality Act (December 24, 1952)."

United States v. *Kershner*, 228 F. 2d 142 (C. A. 6), involved an alien who had entered the United States as a stowaway in 1919, and achieved nondeportable status at the end of five years' residence in this country. He later had been convicted of two separate offenses, but had again achieved a nondeportable status, under the law then in effect, by a conditional pardon as to the second offense. In deportation proceedings, brought under the 1952 Act, this court, in an able and comprehensive opinion by Judge Stewart, held that such an alien was protected in his nondeportable status by the general savings clause in the Immigration and Nationality Act of 1952, notwithstanding certain other provisions of the Act which would otherwise operate to deprive him of such nondeportable status. In the *Kershner* case, the court had before it a section of the statute relating to stowaways, providing that "Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

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[3] Probably should read "statuses." See Title 8, U.S.C.A., Section 1101 (page 156).

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry." Moreover, with regard to the alien's
32 deportation by reason of his two criminal convictions, a section of the statute provided that: "Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—. . . (4) . . . at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct . . . ." The second section of the statute provided that: "The provisions of [the foregoing section] respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and *unconditional* pardon by . . . the Governor of any of the several states . . . ." (Emphasis supplied.) Considering the above cited statutory provisions, standing alone, the court said that they would require affirmance of the district court's order denying a writ of habeas corpus, or, in other words, that the alien would, under the quoted statutory provisions, have no defense to deportation. However, the court went on to point out that Section 405 of the Immigration and Nationality Act of 1952 contained a broad general savings clause, and that this clause preserved the alien's status of nondeportability "unless otherwise specifically provided" in the Act. Since the Act did not specifically provide that the alien's status of nondeportability was not preserved, the court held he was not deportable.

In *United States* v. *O'Rourke*, 213 F.2d 759 (C. A. 8), an alien who, in 1943, had been twice convicted of violation of the law relating to illicit traffic in narcotic drugs, had acquired the status of a nondeportable alien by virtue of the recommendations to the district judge against deportation under Title 8 U.S.C., Section 155(a), 1940 Ed. Under the 1952 Act, deportation proceedings were brought under the same sections of the statute relied upon by the government to deport Catalanotte in the instant case. The court of appeals held that the alien could not be deported under the 1952 Act since he had previously acquired the status of a nondeportable alien, and that such status was protected by the savings clause contained in Section 405 of the Act,

since there was no *specific* provision in the Act that operated to deprive him of such status.

We are confronted with the same general savings clause in the instant case. While the pertinent provision of the statute provides that "Any alien . . . shall, upon the order of the Attorney General, be deported who is, or hereafter at any time after entry . . . has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs . . . ," such provision does not apply to an alien who, prior to the enactment of the statute, had acquired a status of nondeportability, unless, under Section 405 of the Act, it was specifically provided that such status should not be preserved. It was not specifically provided in the Act that appellant's prior status of nondeportability should be set aside. "The savings clause is to be interpreted as protecting status acquired under prior legislation, unless the intent to withdraw that protection is manifestly clear. It was held in [*Shomberg v. United States*, 348 U. S. 540][1] that such intent is clear where it is specifically provided that a provision shall be effective 'notwithstanding' the terms of the savings clause. 'No such clear manifestation of intent is apparent in the present case.'". *United States v. Kershner*, 228 F. 2d 142, 146 (C. A. 6):

In the long and complex provisions in the Immigration and Nationality Act, if there be deemed to exist any reasonable doubt as to whether Congress intended to make an alien deportable, that doubt should be resolved in his favor. *Fong Haw Tan v. Phelan*, 333 U. S. 6, 10. It was said in *United States v. O'Rourke*, 213 F. 2d 759, 765 (C. A. 8): "It seems apparent that the controlling question in this case can be put at rest only by the Supreme Court or by an amendment to the Act. We feel justified in ruling that there is no clear-cut authority in the Act for depriving [the alien] of the status of a nondeportable alien . . . ."

We conclude that Catalanotte's status of nondeportability is protected by Section 405 of the Act, since the

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[1] The Supreme Court, in the *Shomberg* case, pointed out five cases in the 1952 Act where Congress had clearly manifested its intention that certain policies should override the otherwise broad and pervasive principle of the savings clause. 348 U. S. at page 547.

statutory provisions upon which the government relies do not constitute such specific exceptions to Section 405 as are contemplated in that Section in order to make it inapplicable.

It is unnecessary to discuss appellant's claim that the Immigration and Nationality Act of 1952, in its application to him in seeking to make his prior conduct grounds for deportation, is an ex post facto law and, therefore, unconstitutional; but this court has held to the contrary. *United States* v. *Koreshner*, 228 F. 2d 142, 144, 145 (C. A. 6). *Marcello* v. *Bonds*, 349 U. S. 302, cited by the government, is not here applicable since it is not concerned with
34 the savings clause which is the provision of the statute that controls disposition of this case.

The judgment appealed from is reversed and the case is remanded with directions to discharge Catalanotte from custody under the order and warrant for deportation.

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35 Clerk's Certificate to foregoing transcript omitted in printing.

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36 SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1956.

No. 435

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed November 19, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted. The case is transferred to the summary calendar and assigned for argument immediately following No. 72.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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No. 435

In the Supreme Court of the United States

October Term, 1956

JOHN P. MURPHY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, DETROIT DISTRICT, PETITIONER,

v.

GIUSEPPE CARLUCCIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WARREN OLNEY III,
Assistant Attorney General,
BEATRICE ROSENBERG,
Attorney, Department of Justice,
Washington, D. C.

this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. * * *

STATEMENT

Respondent is an alien who entered the United States in 1920. In May 1953, deportation proceedings were instituted against him on the basis of a 1952 conviction for violation of the federal narcotics laws and conviction after entry of two crimes involving moral turpitude—a 1924 conviction for receiving stolen property and a 1934 conviction for malicious threats to extort (see R. 26–28). The 1952 conviction was reversed on appeal and, after respondent had been ordered deported (see R. 50–56), he was allowed to withdraw his plea of guilty to the 1924 charge of receiving stolen property, and the case was dismissed in May, 1954 (see R. 27). As a result, the deportation proceedings were ordered reopened (see R. 28).

At a new hearing, at which petitioner was represented by counsel (R. 26), a new charge was lodged alleging that respondent was deportable by reason of his conviction in 1925 in the United States District Court for the Eastern District of Michigan of violations of federal laws relating to narcotics (R. 33, see R. 43–45). The special inquiry officer found petitioner deportable on that charge (R. 30–31), and the Board of Immigration Appeals sustained his ruling (R. 2–8).

After petitioner had been taken into custody for deportation, he challenged the order of deportation by a petition for a writ of habeas corpus filed in the United States District Court for the Eastern Dis-

trict of Michigan (R. 1b–2b). The District Court, after argument, denied the writ (R. 6b). The Court of Appeals reversed, holding that, since petitioner's conviction for violation of the narcotics laws was not a ground for deportation prior to the Immigration and Nationality Act of 1952, petitioner had a status of non-deportability which was preserved by the savings clause (Section 405 (a) of that Act), despite the provision of Section 241 (a) (11) of the 1952 Act providing for the deportation of an alien "who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs." The Court of Appeals expressed the view that the decision of this Court in *Marcello* v. *Bonds*, 349 U. S. 302, in which the deportation of an alien convicted of narcotics violations which were not grounds for deportation before 1952 had been sustained, was "not * * * applicable since it is not concerned with the savings clause which is the provision of the statute that controls disposition of this case" (App., *infra*, p. 14).

REASONS FOR GRANTING THE WRIT

The decision of the Sixth Circuit in this case follows its prior decision in *United States ex rel. Carson* v. *Kershner*, 228 F. 2d 142, now pending on the Government's petition for a writ of certiorari, *sub nom. Lehmann* v. *United States ex rel. Carson*, No. 72, this Term. In that case, the court held that a person who, having entered this country as a stowaway in 1919, had not been deported within the five year period of limitations provided in Section 19 of the Immigration Act of 1917, and who had been convicted of two crimes